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No. 95-125

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GENERAL MOTORS CORPORATION,
Petitioner,

v.

CITY OF KANSAS CITY, MISSOURI,
Respondent.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals, Western District

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

KENDALL L. HOUGHTON *
General Counsel
WILLIAM D. PELTZ
ELIZABETH C. BURTON
Chair and Vice Chair, Lawyers' Coordinating Subcommittee
COMMITTEE ON STATE TAXATION
122 C Street, N.W.
Suite 330
Washington, D.C. 20001
(202) 484-5222

* Counsel of Record

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Committee On State Taxation ("COST") hereby respectfully requests leave to file a Brief as *Amicus Curiae* in Support of Petitioner. The interest of COST as *amicus curiae* is described *infra* at Brief, pp. 1-3. Despite COST's qualifications to submit an *amicus* brief, Counsel for Respondent has refused to consent to the filing of such a brief. However, in the absence of such permission there are at least two reasons for granting this request.

First, with respect to the Petition filed in this case, COST has additional observations to make concerning

the Due Process implications of the remedial scheme that has been configured by the Missouri courts in this case. A full exposition of the controversy and the potential ramifications of this case by each interested and eligible *amicus* is ultimately to the benefit of the Court in its administration of certiorari writs.

In fact, COST participated in this Court's review of the recent *Reich v. Collins* case as an *amicus* in support of the petitioner and presaged the Court's own conclusion: " 'Bait and switch' tax challenge schemes and remedial 'shell games' *ipso facto* violate both the spirit and substantive principles of Due Process." *Reich v. Collins,* Supreme Court No. 93-908, Brief of *Amicus Curiae* Committee On State Taxation, p. 8. COST's interest in the particular issues raised both by *Reich* and by this case continues unabated, and the sincerity of its efforts as an advocate of Due Process has been demonstrated.

Second, General Motors Corporation is but one of many member companies of COST that are concerned with the ability of state courts to interpret and administer remedial schemes in a manner designed to alleviate states' fiscal resposibility for unconstitutional taxing schemes. The behavior of Missouri State and municipal taxing jurisdictions toward their taxpayers is no less governed by this Court's enunciations of Due Process mandates applicable to remedial schemes than was the behavior of Georgia, the State that this Court directly forbade to engage in "bait and switch" tactics in *Reich v. Collins,* —— U.S. ——, 115 S.Ct. 547 (1994). COST has monitored the variety of tactics utilized by state courts for several years and is uniquely qualified to comment on the scheme in question.

Respectfully submitted,

KENDALL L. HOUGHTON *
General Counsel
WILLIAM D. PELTZ
ELIZABETH C. BURTON
Chair and Vice Chair,
Lawyers' Coordinating
Subcommittee
COMMITTEE ON STATE TAXATION
122 C Street, N.W.
Suite 330
Washington, D.C. 20001
(202) 484-5222

* Counsel of Record

August 21, 1995

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BRIEF OF COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTRODUCTORY STATEMENT

This brief is submitted by the Committee On State Taxation as *amicus curiae* in support of the petitioner in the above-captioned matter. Written consent of the petitioner has been obtained and filed with the Clerk of the Court; the Motion for Leave to File a Brief *Amicus Curiae* is made because the respondent has refused to likewise grant permission to file a brief.

INTEREST OF *AMICUS CURIAE*

The Committee On State Taxation ("COST") is a non-profit trade association that was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce. COST, which was separately incorpo-

rated on December 11, 1991, has a membership of over 410 major multistate corporations, engaged in interstate and international business. COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities.

Many of COST's members are engaged in business in the State of Missouri and in the City of Kansas City, and thus have a particular interest in the ultimate settlement of the remedial landscape for taxes imposed by that municipality, as well as other Missouri municipalities. However, regardless of whether as individual entities they are subject to the taxing jurisdiction of the respondent, the entire membership of COST has a vital interest in ensuring that the mandates of this Court, informed by the Due Process principles of fairness and certainty, are observed by every court in every State of the union, insofar as such mandates impact the equitable tax treatment of business entities.

The clearest enunciation of such principles by this Court in many years was its ruling in *Reich v. Collins*, —— U.S. ——, 115 S.Ct. 547 (1994), wherein taxing jurisdictions were admonished without equivocation that "bait and switch" tactics would not be tolerated in the name of configuring a remedial scheme for unlawful taxation, albeit a scheme that will withstand constitutional scrutiny on its own merits. COST participated in this Court's review of the *Reich* case by submitting a brief as *amicus curiae* in support of the petitioner, and COST fully concurred in this Court's analysis and ruling. It is particularly disturbing, therefore, to see a significant moral victory for taxpayers be wilfully impugned by a state court so soon after the release of the *Reich* decision.

The Missouri courts have completely ignored this Court's Due Process precepts in their treatment of the petitioner, and COST's membership must fear that the literally unruly attitude demonstrated in this instance will pervade the State courts' jurisprudence in all remedial

matters impacting all types of taxes. Furthermore, if Missouri courts are permitted to disregard the supreme authority of this Court, what State will hesitate to do so in the future, particularly where the temptation is to craft holdings that retain unlawfully imposed but much-needed tax revenues? Therefore, COST has an interest in this case.

SUMMARY OF ARGUMENT

The pressures on state courts to ignore Supreme Court precedent and reach an unconstitutional result in the cases before them may be derived from prevailing socio-cultural biases, as in the case of the historical resistance to racial desegregation of public schools, or they may be derived from fears concerning the integrity of the public fisc, as in the case of the state and local taxing jurisdictions' resistance to liability for refunds of unconstitutional taxes. These two scenarios are analogous in certain respects: (1) both involve the state courts' interpretation of state law, but also invoke constitutional due process principles; (2) both issues had or have been spoken to by this Court, and yet state courts continued (regarding racial integration of schools) and continue (regarding the sufficiency of remedies for unconstitutional taxes) to resist the mandates issued by this Court.

With respect to the requirement that public schools be open to all races—a critical due process and equal protection principle—this Court had to police its holding in *Brown v. Board of Education,* 347 U.S. 483 (1954) in the later case of *Harrison v. NAACP,* 360 U.S. 167 (1959). (Court recognized unfairness of permitting state courts to interpret state laws in such a manner as to impede integration and to nullify the effect of the *Brown* holding). With respect to the requirement that remedial schemes pertaining to state and local taxation satisfy due process—a critical requirement, since states have such flexibility in designing their remedial schemes—this Court is now called upon to police its holding in *Reich v.*

Collins in the instant case. Both the holding and strong message in *Reich*, and indeed the very supremacy of this Court, are thrown into question every time a state court chooses the course that Missouri's courts have elected in this case.

This Court should also be prepared not only to apply the *Reich* holding to this case, but also to extend the holding, if it deems the instant case to raise a new facet of the issue it decided in *Reich*. Each of the decisions that this Court has issued in the past ten years addressing the sufficiency of remedies for unconstitutional state and local taxes has built upon the foundations laid down in the prior case. This orderly evolution of case law in a complex and unique area of due process analysis, although gratifying to legal scholars in its own right, serves the much more pragmatic and therefore critical purpose of guiding the behavior and expectations of both taxpayers and taxing jurisdictions. This case presents the same qualifications for review by this Court as its predecessors.

ARGUMENT

I. THIS CASE RESONATES BEYOND THE JURISDICTION AND TAX IN QUESTION, AND POSES A DIRECT CHALLENGE TO THE DOCTRINE OF FEDERAL SUPREMACY AND THE SUPREME AUTHORITY OF THIS COURT TO ENUNCIATE CONSTITUTIONAL LAW

COST's broad membership base engages in business in every state jurisdiction and most municipal jurisdictions in this country. The implications of this case for COST's members and for all taxpayers are dire. From a narrow perspective, all businesses that are subject to taxation by any Missouri municipality that is currently imposing an unconstitutional tax are adversely affected by the Missouri Court of Appeals' interpretation of the tax protest statute. Like the petitioner, they will be foreclosed from obtaining refunds of unconstitutional taxes for all otherwise "open" years (*i.e.*, years for which the statute of

limitations has not run) if, like the petitioner, they reasonably understood the remedial scheme not to require payment under protest of such unconstitutional taxes.

From a broader perspective, this case presents a stand by state courts against United States Supreme Court precedent that is clearly attributable to the courts' percepion that the ruling in question will potentially impair the state's fisc. This Court recently stated, in *National Private Truck Council, Inc. v. Oklahoma Tax Commission,* No. 94-688, 115 S.Ct. 2351 (June 19, 1995), that it has "long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration." Slip Op. at 3. However, the deference accorded to taxing jurisdictions, with respect to the means by which revenues to carry on governmental functions are obtained, ceases to inform this Court's jurisprudence where the taxing jurisdiction in question does not satisfy the requirements of due process. Admittedly, the root due process requirements are flexible—"the [taxing jurisdiction] may determine whether to provide pre-deprivation process (*e.g.*, an injunction) or instead to afford post-deprivation relief (*e.g.*, a refund)." *Truck Council,* slip op. at 4. Nevertheless, as this Court also recently stated in *Reich v. Collins,* what a state "may not do, . . . is hold out what plainly appears to be a 'clear and certain' post-deprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists." *Reich,* 115 S. Ct. at 548.

The operative facts, analysis and holding in *Reich* are, if not identical, clearly related to the case at hand. Neverthless, the Court of Appeals and the Supreme Court of Missouri refused in three separate instances to either reconsider the case or entertain an appeal in light of *Reich.* The State courts' refusal to consider the application of *Reich* in this case, concomitantly with the Court of Appeals' dismissal of the apparently "clear and certain" post-

deprivation challenge which the petitioner had chosen to pursue, constitutes the same sort of "bait and switch" tactics that due process forbids. Permitting state courts to flaunt any ruling of this Court, but particularly one so recently issued and one so hard-fought-and-won by taxpayers, is anathema to the doctrine of federal supremacy and the axiom that this Court is supremely authorized to interpret and apply the laws governing the behavior of all governmental bodies, whether federal, state or municipal.

II. AS *REICH* REQUIRED THIS COURT TO EXTRAPOLATE FROM ITS REMEDIAL JURISPRUDENCE IN *HARPER*, THIS CASE NECESSITATES THE APPLICATION AND POSSIBLE EXTENSION OF THE HOLDING IN *REICH*

The judicial deference that this Court extends to taxing jurisdictions often combines with the Court's use of the narrowest grounds available for decision; additionally, the parties to a case may not properly present the complete assemblage of issues for decision by this Court that are derived from the applicable facts and legal principles. Thus it is that several recent state tax cases decided by this Court have provided guidance to taxpayers on one issue, but have left corollary or secondary questions unanswered which must be posed to the Court in subsequent controversies. For example, *Harper v. Virginia Dept. Of Taxation*, —— U.S. ——, 113 S.Ct. 2510 (1993), addressed the post-*Davis v. Michigan Dept. Of Treasury*, 489 U.S. 803 (1989), issue of whether this Court's decisions announcing rules of federal law in civil cases must have retroactive effect. This Court acknowledged but did not resolve the derivative issue of what constitutes an appropriate remedy for unconstitutional taxes in *Harper*. However, the Court granted certiorari in *Reich v. Collins* (for the second and final time) on the post-*Harper* question of what constitutes a "clear and certain" remedy for unconstitutional taxes, by reference

to *Harper* and *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18 (1990). That particular question remains unanswered in the form it was posed, because *Reich* was ultimately decided on the grounds that due process was not satisfied by State's "bait and switch" tactics where a remedial procedure at least *appeared* to be available at the time the taxpayer chose to pursue it.

Nevertheless, the decision in *Reich* represented another step forward in the orderly evolution of this Court's state and local tax remedial jurisprudence. Today the Court considers the Petition of a taxpayer who has found that *Reich* either (1) resolves its dilemma, but is being ignored by the taxing jurisdiction and the State courts to which the taxpayer posed the case, or (2) requires this Court's analysis and extrapolation of the principles enunicated in *Reich* to resolve an important question of law that is naturally derived from *Reich* and that will continue to arise if not confronted. As this Court has done with the precedent cases of *Harper* and *Reich,* so it should grant certiorari in this case to both further the relevant analytic process and acknowledge the practical ramifications of the various unanswered questions, loose ends and "loopholes" that this line of cases continues to generate.

CONCLUSION

For the reasons set forth above, the Committee On State Taxation respectfully requests that the Court grant a writ of ceriorari and reverse the decision of the Missouri Court of Appeals, or, in the alternative, vacate and remand the case for reconsideration in light of *Reich.*

Respectfully submitted,

KENDALL L. HOUGHTON *
General Counsel
WILLIAM D. PELTZ
ELIZABETH C. BURTON
Chair and Vice Chair,
Lawyers' Coordinating
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